Supreme Court, U.S.
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No. 94-1848

In The

Supreme Court of the United States

October Term, 1994

BMMG, INC., a California corporation; ROBERT S. MANN, an individual; and BOB MANN'S MALIBU GYM, INC., a California corporation,

Petitioners,

vs.

AMERICAN TELECAST CORPORATION, a Pennsylvania corporation; WALLY ARMSTRONG GOLF, INC., a Pennsylvania corporation; WALLY ARMSTRONG, an individual; KENNETH ROGERS aka KENNY ROGERS, an individual; and GEORGE SUMMERALL aka PAT SUMMERALL, an individual,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioners successfully may oppose summary judgment in a Lanham Act action for damages by relying solely on an *inference* of harm from Respondents' non-comparative advertisement absent any *evidence* that the advertisement's alleged falsehoods resulted in a single lost sale to Petitioners.

2. Whether the District Court, in a Lanham Act action between competitors for damages based upon allegedly false advertisements, properly rejected Petitioners' argument that the relevant market consisted of only two companies where Petitioners conceded (a) that there are numerous sources for the product and (b) that a product sold or advertised through any marketing channel potentially competes with a product advertised or sold through any other channel.

LIST OF RESPONDENTS' PARENT COMPANIES AND PARTIALLY OWNED SUBSIDIARIES
(Sup. Ct. Rule 29.1)

Respondent American Telecast Corporation has no wholly owned or partially owned subsidiaries. Wally Armstrong Golf, Inc. has no wholly owned or partially owned subsidiaries. There are no parent companies of either American Telecast Corporation or Wally Armstrong Golf, Inc.

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Respondents American Telecast Corporation ("ATC"), Wally Armstrong Golf, Inc. ("WAGI"), Wally Armstrong ("Armstrong"), Kenneth Rogers aka Kenny Rogers ("Rogers") and George Summerall aka Pat Summerall ("Summerall") (collectively "Respondents") oppose the Petition for Writ of Certiorari filed by Petitioners BMMG, Inc., Robert S. Mann and Bob Mann's Malibu Gym, Inc. (collectively "Petitioners"). Petitioners do not, and cannot, show any special or important reason for this Court to review this ruling against them in an unreported memorandum decision by a unanimous panel of the United States Court of Appeals for the Ninth Circuit.

I. STATEMENT OF THE CASE

A. The Underlying Facts

Petitioner Robert S. Mann ("Mann") is a self-styled fitness expert. Since 1982, Mann, through various companies, including BMMG, Inc. and Bob Mann's Malibu Gym, Inc. (collectively "Petitioners"), has sold inexpensive videotapes on such subjects as fitness training, karate lessons and golf instruction. One of Petitioners' products, a videotape known as "Bob Mann's Automatic Golf," has been sold in retail stores and through mail order for prices ranging from $3.99 to $12.95. The tape also was offered in a multi-tape package through a program-length television commercial, commonly known as an "infomercial," for about $40.

Respondent Wally Armstrong, on the other hand, is one of the country's foremost professional golf instructors. Since 1985, Armstrong has been incorporating his

instructional techniques and specialized training aids into a series of videotapes, including a six-tape video library designed *for golf instructors*. For many years, he dreamed about putting his best ideas, techniques and teaching aids into a comprehensive video training aid package *for consumers*.

At the same time, Respondent ATC, a leading producer of telemarketing products, believed there was a market for a "high-end" set of golf instructional videotapes. In early 1991, ATC began working with Armstrong to develop and produce a package consisting of training aids and videotapes that would incorporate Armstrong's teaching techniques.

Armstrong teamed with sports journalist Pat Summerall and country music recording artist Kenny Rogers, both of whom are avid golfers. After Armstrong showed his then-existing tapes and demonstrated his teaching techniques to them, both Summerall and Rogers agreed to endorse Armstrong's videotape project and appear in an infomercial to market the package.

To gauge the demand for Armstrong's golf instructional package and thereby assess what level of capital investment the proposed manufacturing and distribution of the product could support, Respondents produced an infomercial which was test marketed with five broadcasts in December 1991. The results were overwhelmingly positive. Respondents then decided to invest more than $450,000 in a golf instructional videotape and training aids package which would and did sell for about $150.

Though the golf instructional package was being prepared when the infomercial was "rolled out" on national cable networks in late February 1992, it is uncontroverted that consumers, who had ordered the package during the test marketing program, did not have their credit cards processed until after the package was shipped in March of 1992.

Upon inspecting the package soon after it was completed, Rogers and Summerall were thrilled with the final product and enthusiastically ratified their earlier endorsements. Even Petitioners conceded before the District Court that the final product is superior to Armstrong's previous tapes.

Once Respondents' infomercial began airing regularly, Petitioners stopped purchasing air time for their infomercial. Despite the huge disparity in price between Petitioners' and Respondents' videotapes, Petitioners apparently imagined a competitive threat from Respondents. Rather than compete in the marketplace, however, Petitioners seized on what they claimed were material "misrepresentations" *about Respondents' own products* in Respondents' infomercial and sought to use the judicial system to block out the new market entrants and to extract millions of dollars from them. To implement their plan, Petitioners filed a lawsuit against Respondents alleging that Respondents' infomercial contained false representations in violation of the federal Lanham Act and state unfair competition laws.

Respondents' 28-1/2 minute infomercial does not mention or depict Petitioners, Petitioners' product or any of the hundreds of competing golf instructional products in the marketplace. Instead, the infomercial provides an

extended review of Armstrong's golf instructional techniques and includes endorsements by the Respondent celebrities. The endorsements were based on the celebrities' personal knowledge of Armstrong's teaching techniques and training aids through private instruction and through viewing Armstrong's then-existing instructional videotapes. Although Petitioners claim these endorsements were "premature," because Respondents' golf instructional package for consumers had not been completely assembled when the infomercial was first broadcast, the celebrities re-endorsed Respondents' finished product at about the time it was first shipped to consumers. *Consumers received exactly what was advertised.*

Respondents' infomercial clearly did not contain any factual misrepresentations that materially harmed *the public*. Accordingly, Petitioners are not suing as "vicarious avengers" of defrauded consumers.

Instead, Petitioners are litigating *only* in their own self interest as supposed competitors of Respondents, and claim millions of dollars in damages based on their alleged lost profits. After conducting extensive discovery, however, Petitioners did not come up with a shred of evidence that a single consumer bought Respondents' golf instructional package rather than Petitioners' videotapes, much less that any consumer was motivated to buy Respondents' product based on the alleged misrepresentations in Respondents' infomercial.

B. The District Court Ruling

At the conclusion of discovery, Respondents moved for summary judgment, arguing that none of the alleged

misrepresentations in Respondents' infomercial were material and that Petitioners had presented no evidence of *actual injury* resulting from any alleged misrepresentations.

Petitioners opposed Respondents' motion by presenting the testimony of a purported economics expert, Scott Thomas. Thomas, however, only attempted to prove that the commencement of Respondents' advertising campaign led to a drop in Petitioners' sales. Thomas did not even attempt to meet Petitioners' burden of showing that that result is explained by alleged falsehoods rather than increased competition. Without evidence that a single person actually bought Respondents' golf instructional package rather than Petitioners' videotapes due to the alleged misrepresentations in Respondents' infomercial, Petitioners were forced to resort to "fictions," *viz.*, legal presumptions, to try to create "damages" where none exist.

Finding no evidence that Petitioners were injured by Respondents' alleged misrepresentations, the District Court granted Respondents summary judgment on Petitioners' complaint.

C. The Ninth Circuit Ruling

In an unpublished memorandum entered on December 1, 1994, a unanimous panel of the Ninth Circuit affirmed the District Court's judgment. The panel ruled that "[t]he dispositive issue on appeal is whether [Petitioners] produced actual evidence of injury resulting from the Respondents' alleged false advertising." (Appendix to Petition for Writ of Certiorari ("App.") at

2.) The appellate court concluded that there was no "causal link" between Petitioners' alleged lost sales and Respondents' alleged deception. (*Id.* at 5.)

On February 7, 1995, the same panel voted to deny Petitioners' Petition for Rehearing, and no active judge of the Ninth Circuit requested a vote on Petitioners' suggestion for an *en banc* hearing.

II. MISSTATEMENTS OF FACT IN THE PETITION

Pursuant to Supreme Court Rule 15, this section identifies material misstatements of fact in the Petition for Writ of Certiorari ("Pet.").[1]

Petitioners' statement of the first purported Question Presented is based on an incorrect premise, namely, that Respondents' infomercial is "a completely false advertisement, *e.g.*, an advertisement which promotes that which does not exist. . . . " (Pet. at 4.) While it is true that the first few times Respondents' infomercial was broadcast for test marketing purposes, Respondents' golf instructional package had not been put in its final form, that does not render the infomercial "completely false" or otherwise violate the Lanham Act.

Indeed, Petitioners *conceded* before the District Court that the "use of infomercials to test market products is an accepted industry-wide practice." Petitioners also did not controvert that consumers who ordered Respondents' package during the test marketing program were not

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[1] Petitioners' misstatements of law are addressed in Part III, *infra*.

defrauded because they were given the option of cancelling their order (if they chose not to wait until the package was completed and shipped) and their credit cards were not charged until after the package was shipped. (Respondents' Undisputed Fact Nos. 23, 21.)

Moreover, there is no prohibition against commencing an advertising campaign before completing the advertised product. *See, e.g., Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197 (9th Cir. 1989) (prototype advertised; alleged Lanham Act violation arose not from the defendants commencing an advertising campaign before the final product completed, but rather from advertising a different product than the one actually delivered); *Tripledge Products, Inc. v. Whitney Resources, Ltd.*, 735 F. Supp. 1154 (E.D.N.Y. 1990) (ad violated Lanham Act not because the defendant "was accepting orders without having *any* inventory stock whatsoever" (emphasis in original), but because it misleadingly depicted parts not being offered for sale); *Sheldon Friedlich Marketing v. Carol Wright Sales*, 219 U.S.P.Q. 883 (S.D.N.Y. 1983) (no Lanham Act concerns raised by test marketing a proposed product with ads containing photograph of prototype).[2]

Petitioners' description of Respondents' infomercial (Pet. at 7-8) also contains numerous misstatements. Respondents' infomercial consisted of a nearly half-hour

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[2] Revealingly, Petitioners ignore *Tripledge Products, Sheldon Friedlich Marketing* and other cases that specifically address the issues relevant to this case, in favor of inapplicable authorities such as *Summers v. Tice*, 33 Cal. 2d 80 (1948), a 47-year-old state court case dealing with joint tortfeasor liability. *See* page 15, *infra*.

presentation of Armstrong's golf instructional techniques along with about a minute of celebrity endorsements. Although Petitioners now contend the celebrities endorsed non-existent tapes, Petitioners *conceded* before the District Court that, in Respondents' infomercial, the celebrities endorsed Armstrong's golf instructional *techniques*, not any particular videotape. (Respondents' Undisputed Fact No. 11.)[3]

Petitioners also claim Respondents' infomercial promised a "revolutionary" and "breakthrough" technique whereby the source of a golfer's power is in the wrists rather than the legs. To the contrary, Respondents' breakthrough technique was Armstrong's use of simple instructional aids such as coat hanger and sponge devices that can be used along with videotapes to teach a proper golf swing. In any event, the emphasis placed by an instructor on one part of his body over another in order to teach a powerful golf swing are generalized statements that do not comprise the type of factual misrepresentations actionable under the Lanham Act. *See, e.g., In re All Terrain Vehicle Litigation*, 771 F. Supp. 1057, 1060-61 (C.D.

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[3] Petitioners also did not dispute that the celebrities ultimately reaffirmed their endorsements once they inspected the finished product. Accordingly, Petitioners necessarily conceded that the endorsements were, at most, only premature, not false. *See Marcyan v. Nissen Corp.*, 578 F. Supp. 485, 507 (N.D. Ind. 1982), *aff'd w/o opin.*, 725 F. 2d 687 (7th Cir. 1983) ("Plaintiffs have not offered one shred of evidence that [the endorser] in any way disagrees with the statement in the endorsement or that it is not true. Accordingly, there is no 'false statement.' "); *Data Cash Systems, Inc. v. JS&A Group, Inc.*, 223 U.S.P.Q. 865, 867 (N.D. Ill. 1984) (although the defendant's original ad implied a nonexistent celebrity endorsement, no Lanham Act violation because the celebrity eventually did endorse the product).

Cal. 1991), *aff'd*, 979 F.2d 755 (9th Cir. 1992) (statement that so-called "all terrain vehicles" are "precisely balanced in the frame for superb handling" held, as a matter of law, not actionable).

Petitioners state that when Respondents' infomercial was broadcast, "Petitioners' sales took a dramatic plunge." (Pet. at 9.) This fact alone (if it be a fact) is grossly misleading because it fails to demonstrate that Petitioners lost a single sale *due to any misrepresentations in Respondents' infomercial*, ~~rather~~ than to competition or Petitioners' own marketing decisions. *See Lindy Pen Co. v. Bic Pen Corp.*, 725 F.2d 1240, 1244 n.2 (9th Cir. 1984), *cert. denied*, 469 U.S. 1188 (1985) (rejecting plaintiff's argument that actual confusion from defendant's trademark infringement can be inferred from evidence that plaintiff's sales dropped once defendant began marketing its competing product).

Petitioners suggest, without any support whatsoever, that Respondents' minor editing of their infomercial in July 1992, in response to Petitioners' complaints, resulted in Petitioners being "able to reenter the infomercial market in September 1992. . . . " (Pet. at 10-11.) Nothing, however, prevented Petitioners from "reentering" the infomercial market at any time. The fact that Petitioners deliberately chose not to advertise their product during the first half of 1992, when Respondents' infomercial was being heavily broadcast, is *not* evidence that Petitioners

were damaged by Respondents' alleged misrepresentations.

Petitioners suggest that the District Court granted Respondents summary judgment despite Petitioners "controverting nearly a dozen of Respondents' allegedly undisputed facts. . . . " (Pet. at 12.) In fact, the District Court made no finding to that effect. Instead, the District Court focused on the key element of causation and held that Petitioners failed to raise a triable issue that Respondents' alleged misrepresentations resulted in any damage to Petitioners. (App. at 15-25.)

Petitioners refer to the testimony of their purported expert, "Dr. Thomas Scott" [sic, Scott Thomas], and state: "The Ninth Circuit misstates the record when it concluded that Petitioners solely relied on comparative sales data." (Pet. at 17.) It is Petitioners who misstate the record. The Ninth Circuit expressly reviewed Dr. Thomas' affidavit and analysis, as well as Petitioners' attempt to rely on judicially-created presumptions of injury. (App. at 3-5.)

Petitioners next claim "[t]here was evidence that at least *some* of [Respondents'] sales were at the expense of Petitioners' sales." (Pet. at 18, emphasis in original.) Petitioners also state that "[t]here was admissible evidence that [Respondents' sales and Petitioners' alleged lost sales] were causally connected." (Pet. at 22.) Yet, even if Petitioners' so-called "evidence" somehow links the two companies' sales performance, this is not the *relevant* inquiry in a false advertising claim. The Ninth Circuit correctly found "[t]here is no evidence sufficient to create a genuine issue of material fact as to whether the alleged

deception caused any injury to [Petitioners]." (App. at 4, emphasis in original.)

III. REASONS WHY THE PETITION SHOULD BE DENIED

A. The Courts Below Did Not Deny Petitioners Due Process And Equal Protection By Requiring Them To Raise A Genuine Issue of Material Fact That Misrepresentations In Respondents' Infomercial Caused Lost Sales To Petitioners

Although Petitioners assert, at least twice, that they were denied due process and equal protection of the laws, they never explain how that is so. (Pet. at 13-14, 25-27.) As near as Respondents can make out, Petitioners apparently claim both the District Court and the Ninth Circuit deprived Petitioners of their rights by requiring them to raise a triable issue of fact supporting a causal link between Respondents' alleged misrepresentations and Petitioners' alleged lost sales. But that requirement is neither unfair nor improper: it is fundamental in a Lanham Act action seeking damages.

Unlike injunctive relief, which, to protect the consumer, may be awarded even where the likely impact of the defendant's false advertising is subtle and slight, money damages "primarily aid only the competitor, and he is required to satisfy a much higher standard of proof as to injury in order to recover damages." 2 J.T. McCarthy, *McCarthy on Trademarks and Unfair Competition* § 27.04[3][d] at 27-46 (3d ed. 1995) (*"McCarthy"*), *citing Harper House, supra*. The reason for requiring the plaintiff to prove actual loss (not a mere likelihood of harm) to

recover damages is to ensure that he does not reap a windfall. *Johnson & Johnson v. Carter-Wallace, Inc.*, 631 F.2d 186, 192 (2d Cir. 1980).

To meet his burden, the plaintiff must show "actual evidence of some injury *resulting from the deception . . . .*" *Harper House*, 889 F.2d at 210 (emphasis in original). Put another way, the plaintiff must prove that, "[b]ut for [the defendant's] misrepresentation, the sales made by the defendant would have been made by the plaintiff." *Burndy Corp. v. Teledyne, Inc.*, 584 F. Supp. 656, 665 (D. Conn.), *aff'd*, 748 F.2d 767 (2d Cir. 1984); *Johnson & Johnson*, 631 F.2d at 191 (monetary relief barred due to plaintiff's "inability to point to a definite amount of sales lost *to [defendant]*") (emphasis in original); *Alpo Petfoods v. Ralston Purina Co.*, 913 F.2d 958, 969 (DC Cir. 1990) (actual damages measured by "profits lost by the plaintiff on sales actually diverted to the false advertiser").

Thus,

> [Petitioners] must prove that at least some customers have been actually deceived and that [Petitioners have] been injured by actual consumer reliance on the false advertising. Such actual deception and resulting customer reliance can be proven not only by evidence of actual diversion of sales to [Respondents], but actual deception can be shown by customer surveys or by testimony of a dealer, distributor or customer.

2 *McCarthy* § 27.05[2][a] at 27-57.

Here, *Petitioners have no direct evidence* of actual diversion of sales, *i.e.*, that a single consumer saw both parties' infomercials and bought Respondents' product rather

than Petitioners' because he was deceived by Respondents' alleged misrepresentations. *Nor do Petitioners have any circumstantial evidence* of lost sales or consumer deception such as the consumer surveys upon which other Lanham Act plaintiffs typically have relied. *See, e.g., U-Haul International, Inc. v. Jartran, Inc.*, 601 F. Supp. 1140, 1148-49 (D. Ariz. 1984), *aff'd*, 793 F.2d 1034 (9th Cir. 1986); *Johnson & Johnson*, 631 F.2d at 191; *Vidal Sassoon v. Bristol-Myers*, 661 F.2d 272, 276-78 (2d Cir. 1981); *Coca-Cola Co. v. Tropicana Products, Inc.*, 690 F.2d 312, 317 (2d Cir. 1982) (consumer survey "provided the causative link between the advertisement and the plaintiff's potential lost sales").

Instead of evidence, Petitioners attempt to rely on an inapplicable legal presumption they find in the *Jartran* opinion. In *Jartran*, the Ninth Circuit held that, where the defendant is found to have engaged in intentional deception in the context of a comparative ad, consumers are presumed to have been deceived. 793 F.2d at 1041. *Harper House* applied this presumption to a situation where a jury found the defendants intentionally deceived consumers "into purchasing a product different than that advertised . . . . " 889 F.2d at 209.

The present case is easily distinguishable: it involves neither a comparative ad nor a situation in which consumers received a product different than that advertised. Thus, the *Jartran* presumption of consumer deception does not apply.

Moreover, even assuming *arguendo* an issue of fact as to whether consumers were deceived, the *Jartran* presumption does *not* excuse Petitioners from proof that

Respondents' allegedly deceptive advertisement caused Petitioners harm. *Harper House*, 889 F.2d at 209 (despite presuming consumers were deceived, no presumption that plaintiff had been injured); *FTC v. Figgie Int'l*, 994 F.2d 595, 606 (9th Cir. 1983) *cert. denied*, ___ U.S. ___, 114 S. Ct. 1051, 127 L. Ed. 2d 373 (1994) (no presumption that consumers would have bought plaintiff's product or any product at all, rather than defendant's). As the Ninth Circuit correctly found, Petitioners have no such proof. (App. at 4-5.)

Instead, Petitioner Bob Mann proffers only (a) his self-serving declaration that Respondents' infomercial caused him to lose sales and (b) the testimony from a purported economics expert precisely to the same effect. Even if this "evidence" could establish a link between Respondents' infomercial and Petitioners' alleged losses, this would not constitute "actual evidence of some injury *resulting from the deception*," rather than from competition. *Harper House*, 889 F.2d at 210 (emphasis in original). (App. at 3-5.) *See also Can-Am Engineering Co. v. Henderson Glass, Inc.*, 814 F.2d 253, 258 (6th Cir. 1987) (proof of a decrease in plaintiff's sales contemporaneous with defendant's new advertising is insufficient to prove that lost sales were caused by defendant's alleged misrepresentations); *Toro Co. v. Textron, Inc.*, 499 F. Supp. 241, 253-54 (D. Del. 1980) ("Section 43(a) [of the Lanham Act] prohibits unfair competition rather than competition itself and [plaintiff] has failed to show that the experience of these parties in the marketplace was a product of the former, rather than the latter.").

Petitioners err when they argue that evidence of the link between deceived consumers and Petitioners' lost

sales goes to the weight, rather than to the fact, of harm. *See, e.g.*, Pet. at 14 (citing *Grant Airmass Corp. v. Gaymar Industries, Inc.*, 645 F. Supp. 1507 (S.D.N.Y. 1986)); and at 21-22 (citing *Summers v. Tice*, 33 Cal. 2d 80 (1948)). *Summers v. Tice* presents the classic tort law problem where the plaintiff was injured by one or the other or both of two defendants, but does not know the extent of harm each did. In that case, where the fact of injury is undisputed, tort law will require the defendants to apportion fault amongst themselves. In the present case, of course, the crucial issue is whether Respondents' alleged misrepresentations caused any harm, *at all*, to Petitioners.

Grant Airmass involved a claim by the plaintiff that the defendant's series of advertisements directly comparing the plaintiff's and the defendant's products were based on false scientific analysis. The District Court denied summary judgment to the defendant because the plaintiff presented "credible evidence of diversion of sales resulting from [the defendant's] allegedly false claims of product superiority." 645 F. Supp. at 1514. The plaintiff's evidence in that case included deposition testimony of a number of purchasers who read and relied on the allegedly false claims in the defendant's ads in making their purchasing decisions. Here, of course, Petitioners present no evidence of diversion and there is no reason to believe that a viewer of Respondents' non-comparative infomercial would have purchased *Petitioners'* product *but for* Respondents' alleged misrepresentations regarding *Respondents'* product.[4]

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[4] It is hardly surprising that Petitioners are unable to provide any proof of causation. Damage actions for false

Having reviewed *de novo* the evidence in this case,[5] the Ninth Circuit correctly found that "[t]he causal link is missing." (App. at 5.)

B. There Is No Conflict Between The Circuits Regarding The Determination Of The Relevant Market Under The Lanham Act

Petitioners weakly contend that the Ninth Circuit's affirmance of summary judgment created a conflict with another Circuit[6] on whether or not a determination of the "relevant market" can be made by the trial court. (Pet. at 17-20.) No such conflict exists.

First, the Ninth Circuit's unpublished memorandum neither mentions nor assumes anything about relevant

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advertising (outside the context of false *comparative* advertising) regularly founder on the plaintiff's inability to show diverted sales resulting from the alleged misrepresentations. *See, e.g., Harper House*, 889 F.2d at 210-11; *Burndy Corp., supra*, 584 F. Supp. at 665; *Otis Clapp & Son, Inc. v. Filmore Vitamin Co.*, 754 F.2d 738, 746 (7th Cir. 1985).

[5] The Petition curiously states: "The Ninth Circuit's December 1, 1994 memorandum opinion does not indicate that the Court applied the appropriate *de novo* standard of review." (Pet. at 24.) Although the Memorandum Opinion does not use the words "*de novo*," the panel itself reviewed the evidence – including the declaration and analysis of Petitioners' purported expert, Dr. Thomas – before concluding that "[t]here is not evidence sufficient to create a genuine issue of material fact. . . . " (App. at 4.)

[6] Petitioners claim the conflict is between the Ninth and *Seventh* Circuits (Pet. at 19-20), but their sole authority on this point is a *Third* Circuit case, *Country Floors, Inc. v. Gepner*, 930 F.2d 1056 (3d Cir. 1991).

markets. All it says is that Petitioners failed to show a causal connection between their alleged lost sales and Respondents' alleged deception; this proposition holds true regardless of the size or definition of the relevant market. As the District Court noted below, even if only Petitioners and Respondents chose to market golf instructional videotapes through the infomercial technique, there remained "multiple differences" in the parties' marketing methods, including "price, quantity, possibly quality." These differences preclude the theory that any sales of Respondents' product necessarily caused a decrease in the sales of Petitioners' product. (App. at 19-20.)

Second, the Third Circuit case Petitioners cite, *Country Floors, Inc. v. Gepner*, 930 F.2d 1056 (3d Cir. 1991), does not in any event address the same issue that was raised by Petitioners in the District Court below. *Country Floors* involved a Lanham Act suit for injunctive relief over similar trademarks used by the plaintiff and the defendant in connection with tile flooring. After reversing a grant of summary judgment to the defendant based on the likelihood of confusion issue, the Third Circuit noted, in *dicta*, that there was also an evidentiary dispute over whether the plaintiff's and the defendant's customers were sophisticated members of the trade and therefore less likely to be confused as between similar trademarks. 930 F.2d at 1066. Thus, the issue in *Country Floors* was the determination of the "relevant customer market," not the definition of the "relevant sales channel," as in the present case.

Third, the District Court below did nothing inconsistent with *Country Floors*. To the contrary, in determining

that Petitioners and Respondents did not compete exclusively in any specialized "infomercial sub-market," the District Court relied on Petitioners' own concessions that: (1) there are hundreds of golf instructional videotapes on the market;[7] and (2) products advertised or sold through different marketing channels compete with one another. (App. at 15-20.) Accordingly, unlike in *Country Floors*, there was no genuine issue of material fact because Petitioners completely undermined their own argument that the relevant market consisted of only two companies.

Consequently, there is no actual or genuine conflict between the Circuit Courts of Appeal that would support the grant of this Petition.

C. This Case Presents No Special Or Important Reason To Address The Purposes Or Application Of The Lanham Act

Petitioners argue that this case is "of exceptional importance" supposedly because it "frustrates the purposes of the Lanham Act" to preserve free and fair competition. (Pet. at 25.) But it is Petitioners who have sought to stifle competition by seeking judicial intervention to remove a competitor. Fortunately, to prevent the Lanham Act's misuse for anticompetitive purposes, courts have required that one who invokes the statute meet the burden of proving he has been injured from the alleged false advertising.

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[7] This concession distinguishes *Electronics Corp. of America v. Honeywell, Inc.*, 428 F.2d 191 (1st Cir. 1970), cited in the Petition at 15. In *Electronics Corp.*, the defendant made replacement parts for the plaintiff's electrical control units, the only other supplier of which parts was the plaintiff.

In this case, Petitioners were given ample opportunity to present evidence – if they could – of harm resulting from Respondents' allegedly false advertisement. There is no evidence consumers were harmed; nor could Petitioners cite to a single sale that was diverted from them to Respondents due to any alleged misrepresentations. Accordingly, in two narrowly-drawn, well-reasoned and unpublished opinions, the District Court and the Ninth Circuit concluded that Petitioners had not met their burden of raising a triable issue of fact on the crucial element of causation of harm.

By properly applying the Lanham Act's requirements, the statute's pro-competitive purposes were well served. In these circumstances, this case presents no special or important issue to be resolved by this Court.

IV. CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

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Respectfully submitted,

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